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Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Piercey v. Civil Service Comm.*, No. 7278 (Utah Supreme Court, 1949).
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**IN THE SUPREME COURT
of the
STATE OF UTAH**

J. K. PIERCEY, Chief of the Fire
Department of Salt Lake City, a
municipal corporation of the State
of Utah,

Plaintiff,

vs.

CIVIL SERVICE COMMISSION
OF SALT LAKE CITY, and
HAROLD FOX,

Defendants,

BRIEF OF DEFENDANTS

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FILED

1949

CLERK, SUPREME COURT, UTAH

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Case No.
7278

BRIEF OF DEFENDANTS

STATEMENT OF FACTS

A. PRELIMINARY STATEMENT

All italics are ours.

Defendants are unable to accept the statement of facts contained in plaintiff's brief and will therefore state what they consider the facts in this case to be.

The letter "R", when used herein, refers to the judgment roll, and the letter "T", refers to the transcript of testimony.

On the 5th day of August, 1948 defendant, Fox, Fireman First Grade, in the Salt Lake City Fire Department, was arrested by the Salt Lake City Police for drunkenness and at the time Fireman Fox was at his own home. Thereafter a jury in the City Court of Salt Lake City found Fireman Fox not guilty of the charge. After his arrest on the night of the 5th of August, and while he was in the Salt Lake City Jail, Fireman Fox requested the City Jailer to call the Fire Department and request that Chief Piercey come to the City Jail to see him. Chief Piercey came to the jail and talked to Fireman Fox and at that time asked Fireman Fox to resign from the Salt Lake City Fire Department. He also told Fireman Fox to be in his office at the Fire Department Headquarters the next morning. Soon after Chief Piercey's visit Fireman Fox was released from jail and returned to his home. He reported for work on the morning of the 6th and commenced the performance of his duties as a fireman. At about twenty-five minutes to ten Fireman Fox's superior in the Fire Department received a telephone call which requested that Fireman Fox appear at the Chief of the Fire Department's office at eleven o'clock and that Fox was not to continue working (T. 9). Fireman Fox reported to the Fire Depart-

ment Headquarters and was ushered into the presence of Chief Piercey and the members of Chief Piercey's Board of Chief Officers. Chief Piercey immediately told Fireman Fox that he was through with the Fire Department and requested that he resign. He then said: "If you don't resign, I'll blast you and smear you in every newspaper in Salt Lake City. I'll make it so miserable you can't get a job in this city." (T. 12). Fireman Fox at that time refused to resign and was requested to return to the office at 1:30. At 1:30 Chief Piercey handed Fireman Fox a discharge. Fireman Fox testified concerning his state of mind, as follows:

"A. * * * I said to Larry, 'Larry, what are we going to do?' I says, 'If he does what he says he will do, what will become of you and your mother and father and three children.' * * * I was so worried that I didn't know what to do.

"Q. What were you worried about, Mr. Fox?

"A. I figured if he carried out his threats, why it would be just like he said—it would be difficult for me to find work. I figured the only thing to do was to resign." (T. 14)

* * * *

"A. Well, knowing Chief Piercey was an influential, high official, I knew he would be very instrumental in my obtaining employment anywhere else. I was quite scared and quite worried, and I signed it because I didn't want him to carry out his threats, for fear of my family going to go without.

“Q. What threats do you have reference to, Mr. Fox?

“A. When he said he would make it so miserable, smear me and make it so miserable it would be impossible for me to find a job.” (T. 15)

After considering the matter about ten minutes, Fox returned and asked if it was too late to resign and have the story to the newspapers stopped. Chief Piercey said he thought he could stop the story and would do his level best to stop it. While Fireman Fox was present Chief Piercey called the newspapers and requested the story concerning him be changed. Plaintiff's Exhibit “B” indicates the type of information which Chief Piercey had given the Salt Lake newspapers concerning Fireman Fox.

After Fireman Fox had returned to Piercey's office the secretary for Piercey typed up a letter of resignation. Fox signed the letter and before he left the Chief's office arrangements were made by the Chief for him to turn in all his equipment and surrender his locker (T. 42). That afternoon all of Fox's equipment was taken from him (T. 146, 147, 148). Fox has not been recalled or notified since that time to return to his employment as a fireman, nor has any attempt been made to reissue his fireman's equipment. After more mature consideration, Fox consulted an attorney and the letter of resignation was withdrawn (T. 16, 17). The letter of resignation from Fox was forwarded to City Commissioner Romney with a letter of transmittal, which letter of transmittal reads as follows (R. 47):

“*Commissioners’ Exhibit A*

August 6, 1948

Hon. L. C. Romney, Commissioner
Public Safety Department
and Board of City Commissioners
City and County Building
Salt Lake City 1, Utah

Gentlemen:

Harold Fox, Fireman First Grade, has submitted his resignation to become effective as of August 6, 1948.

I respectfully request that his resignation be accepted.

Respectfully yours,

/s/ J. K. Piercey

Chief of Fire Department

JKP/ef”

The Salt Lake City Commission took the matter under consideration, and on August 18th the following letter was forwarded to defendant (R. 31):

“August 18, 1948

Mr. Harold Fox,

City

Dear Sir:

At a meeting of the Board of Commissioners held August 17, 1948, your petition No. 846 tendering your resignation from the Salt Lake City Fire Department, effective August 6, 1948, was taken up and filed and I was directed to notify you that in view of the opinion of the City Attorney, copy of which is submitted, *the Board of Commissioners has at this time accepted your resignation.*

Yours truly,

/s/ Irma F. Bitner

City Recorder”

Immediately after receiving notice of the board's action, Fireman Fox filed a Notice of Appeal with the Civil Service Commission from the action of the Board of City Commissioners and Chief Piercey. The Civil Service Commission accepted jurisdiction of the matter. In his response to the order of the Civil Service Commission (T. 15) Chief Piercey alleged that Fireman Fox had resigned and then stated (T. 16): “ * * * there are no specifications of complaint of removal to be made herein.” Defendants understand the quoted sentence to mean that there is no cause for removal claimed by the plaintiff.

In answer to the response of plaintiff, Fox alleged that his resignation was withdrawn before it was acted upon by the proper authorities and that the resignation was obtained by duress and was therefore a nullity (T. 17-B). A hearing was held on the 22nd of November, 1948. Thereafter, on the 20th day of December, 1948 the commission made and entered its Findings of Fact, Conclusions of Law and Decree which required that Fireman Fox be reinstated in his position as Fireman First-Grade in the Salt Lake City Fire Department as of August 6th, 1948 (R. 23, 24). Since that time, however, Fireman Fox has not been recalled to duty nor received any notice from the Fire Department of his reinstatement.

B. STATEMENT OF THE CASE

As defendants analyze the matters presented by plaintiff's brief and the issues which were before the Commission, there seems to be two logical propositions

to be discussed. The first is, did the Civil Service Commission of Salt Lake City have jurisdiction over the removal of Fireman First-Grade Harold Fox by the Chief of the Fire Department and Salt Lake City Commission? Second, was there sufficient evidence presented at the hearing from which the Civil Service Commission could make the Findings of Fact, Conclusions of Law and Decree, which were made, and are said Findings, Conclusions of Law and Decree sufficient as matter of law?

SUMMARY OF ARGUMENT

POINT I.

The Civil Service Commission is empowered by law with the right to entertain appeals from removal through resignation.

POINT II.

There is substantial evidence in the record which supports the findings of fact, conclusions of law and decree.

ARGUMENT

POINT I.

The Civil Service Commission is empowered by law with the right to entertain appeals from removal through resignation.

The jurisdiction of the Civil Service Commission is set forth in the Utah Code Annotated, 1943, under several sections. Defendants consider Sections 15-9-9; 15-9-10;

15-9-14; 15-9-16, and 15-9-21, as important in showing the legislative intention. The Civil Service Commission must have the power to protect the civil servants from removal from office without cause. These various sections will be discussed separately.

Section 15-9-9 provides in part as follows:

“The head of each of the police and fire department * * * shall by and with the advice and consent of the board of city commissioners and subject to the rules of the Civil Service Commission * * * appoint * * * members * * * in his department.”

Section 15-9-10 provides in part as follows:

“ * * * No appointment to any place of employment in such departments shall be made, except according to law and under the rules and regulations of the Civil Service Commission * * * .”

It is quite apparent from these two sections, the power to appoint is vested in the chief only with the *advice and consent of the city commission and then subject to the rules of the Civil Service Commission.*

Section 15-9-14 vested in the Civil Service Commission the right to make the rules to carry the law into effect.

“The Civil Service Commission shall make all necessary rules and regulations to carry out the purpose of this article *and for* * * * appointment and promotions.”

The legislature even went further and said the chief could appoint only those selected and certified by the Civil Service Commission:

Section 15-9-16:

“In all cases the appointing power shall notify the Civil Service Commission of each separate position to be filled and shall fill such places by appointment of one of the persons certified by the commission therefor. Such appointments shall be on probation, and *of a character* and for a period to be prescribed by the Civil Service Commission.”

The department head's power to appoint is very limited surrounded with many restrictions, including the Rules of the Civil Service Commission.

Defendants might well admit the truth of the proposition argued by the plaintiff under his brief, Section IV, that the appointing power is the power which must accept a resignation. No contention that the resignation of Fox could be effective prior to acceptance by the proper authority could possibly stand. In this regard defendants refer the court to *Tooele County v. De La Mare et al*, 90 Utah 46, 59 P. (2d) 1155, and *Edwards v. United States*, 103 U. S. 471, 26 L. Ed. 314, 95 A.L.R. 215. The only question remaining is, who is the proper authority to accept the resignation of a fireman.

The Chief being required to get the consent of the City Commission to employ, it follows that he must obtain the consent of that body to discharge or accept a resignation, and both the City Commission and the

department head must act in accordance with the rules of the Civil Service Commission.

Piercey was aware of the fact that he must obtain the consent of the City Commission, for he mailed to them the letter of resignation with a letter of transmittal dated August 6th, which read: "I respectfully request that his resignation be accepted." Chief Piercey now contradicts the statements he made in the letter of transmittal. He says that he had already accepted Fox's resignation and action by the City Commission was unnecessary. Here defendants believe Piercey's actions speak louder than his testimony at the hearing.

Plaintiff's arguments that the Civil Service Commission was without jurisdiction to hear the appeal of Fox seems to rest on two propositions:

(a) The law does not empower the commission to review the removal of civil servants except where they are discharged.

(b) There is no discharge here because the statute governing discharge was not complied with. Definite provision is made for removal of a Civil Service employee by Section 15-9-21:

"All persons in the classified Civil Service may be removed from office or employment, by the head of the department, for misconduct, incompetency or failure to his duties or failure to observe properly the rules of the department, but subject to appeal by the aggrieved party to the Civil Service Commission. Any person discharged

may within five (5) days *from the issuing by the head of the department of the order discharging him appeal* therefrom to the Civil Service Commission, who shall fully hear and determine the matter.

“The findings and decision of the Civil Service Commission, upon such hearing, shall be certified to the head of the department, *from whose order the appeal is taken*, and shall be final and shall forthwith be enforced and followed by him.”

It will be noted that the removal may be by the head of the department but subject to *the right of appeal to the Civil Service Commission, who shall hear and fully determine the matter*. The Chief does not possess the full right to effect the removal of an employee from civil service, either by discharge or otherwise. The Civil Service Commission under the above quoted provisions has the right and duty to hear appeals from removals from civil service office. It is true where the removal takes the form of a discharge, the statute is more specific about the time when appeal must be taken. This, however, cannot logically be construed that only discharges are appealable.

A very enlightening decision by this court is *Thompson v. Civil Service Commission*, 103 Utah 162, 134 P. (2d) 188, 1943. It illustrates clearly a type of removal from office which is not a discharge. Thompson, at the request of the City Commission, resigned his office as Chief of the Fire Department. The question then arose, was Thompson *removed* for cause. The case does not specifically construe the word “removed” as that word

is used in 15-9-21, but it does use “removed” to describe the manner that Thompson was deprived of his *office*.

Plaintiff points to the language of *Vetterli v. Civil Service Commission*, 106 Utah 83, 145 P. (2d) 792, which states that “removal” and “discharge” are synonymous as proving that the only removal there can be appeal from is a discharge. A careful examination of Justice McDonough’s language completely dispels any such inference. The only manner in which “remove” and “discharge” are held to be synonymous is that both words mean a permanent severance from office rather than a temporary suspension from duty.

In the *Thompson* case the court seemed to anticipate the dispute now before it. In the opinion it is stated:

“ * * * We do not hold that in a proper case the Civil Service Commission may not go behind the resignation to the real facts as to the retirement from office, but it cannot go beyond the actual facts as to what the City Commission actually did, and why it did so.” (134 P. 2d 188, 193)

There are no cases which directly pass on the precise point now before this court. However, in *Kidd v. State Civil Service Commission*, 13 Cal. App. (2d) 653, 57 P. (2d) 569, the problem presented to the Civil Service Commission was similar to the present case. Kidd had resigned and then withdrew his resignation. His immediate superior refused to allow him to resume his duties. He appealed to the Civil Service Commission. A hearing was granted, the whole matter gone into and

the charges of inefficiency brought by the department head, sustained. Kidd's removal from office was upheld. The court, on appeal, held that the resignation was obtained by coercion and duress. *Kidd v. State Civil Service Commission* (1936 Cal. App.) 55 P. (2d) 245. But when the fact that the charges of inefficiency had been sustained was called to the court's attention they affirmed and ignored the irregularity of procedure.

Chief Piercey did not see fit to present to the Civil Service Commission the case against Fox on its merits, but instead stated that he had no charges to prefer. His purpose was to defeat Fox's right of appeal. Apparently he feels that by obtaining a resignation, regardless of the method used, he can exercise an arbitrary power of dismissal over the Civil Service personnel in his department and thus defeat the purposes of the Civil Service Commission.

It seems obvious that the department heads may, through the resignation loophole, remove whomever they wish without cause, and the spoils system can again be established. The threat of publicity is not the only coercion the Chief could use. He can, within his department, make life extremely miserable for an employee. His power to harass and annoy employees is unlimited. When they finally break under the pressure and resign, then, if plaintiff is correct, they are barred from even seeking the protection of the one body which the law creates to protect them from arbitrary and capricious removal from *office*.

Plaintiff contends further that there is no appeal because the formalities of discharge were not complied with. He seeks to use his own failure to discharge to defeat the rights of defendant Fox to appeal. The absurdity of this contention seems obvious, by failing to make a discharge in writing a department head could defeat every removed employee's right to appeal.

The Commission, if it is to provide protection for our civil servants, must have the necessary power to prevent the use of such an obvious subterfuge. An enlightening opinion on the question of compliance with the formal requirements of a discharge is *Bodmer v. Police Mutual Aid Association*, 94 Utah 450, 78 P. (2d) 640. This court was not willing to allow a police officer to benefit from a deficient compliance with Section 15-9-21 and the Fire Chief's position is deserving of much less consideration where he seeks to take advantage of his own conduct in withdrawing the discharge. The only way that a civil servant can get his removal from office before the Civil Service Commission for review is through an appeal. The Commission, it was held in *Thompson v. Civil Service Comm.*, 103 U. 162, 134 P. (2d) 188, 195, had no power to review such matters without appeal.

Plaintiff argues that a mere board of three laymen should not be allowed to pass upon such technical matters as presented here because there is a judicial question to be determined. The present Civil Service Commission is composed of an outstanding lawyer, a former District

Court Judge, and only a single mind not trained in our judicial manner of thinking. But even if all the members of the board were only laymen, the Legislature has determined that the Commission, be it laymen or lawyers, "shall fully hear and determine the matter." Having these functions we must recognize that the Commission is empowered with certain judicial functions. *Souder v. City of Philadelphia, et al.*.....Pa....., 156 Atl. 245, 10 Am. Jur. Section 14.

The Commission is specifically a reviewing body and as such must exercise judicial powers. This court recognized this fact in the *Bodner, Thompson* and *Vetterli* cases. In the *Vetterli* case this court held that the review of a Civil Service Commission was limited to determining whether the Commission "acted arbitrarily or capriciously." *Vetterli v. Civil Service Commission of Salt Lake City*, 106 U. 83, 145 P. (2d) 792, 797.

It is respectfully submitted that the Civil Service Commission is empowered to entertain an appeal from a removal from office even though a resignation is obtained by the department head and that the appeal of Fireman Fox was lawfully and properly before the Commission for review.

POINT II.

There is substantial evidence in the record which supports the findings of fact, conclusions of law and decree.

The findings of Fact are not only fully supported by Fireman Fox's testimony, but they find support in all the testimony.

Chief Piercey himself admitted that he told Fox it would be a lot easier for him to find employment if he would resign. All the Assistant Chiefs were sure that the Chief explained the "consequences" of a discharge to Fox. They are somewhat vague when it comes to just what those consequences were, but they did involve publicity and job opportunities. It was not the threat of discharge which the Commission found compelled Fox to resign, it was the publicity and the effect on employment opportunities which Piercey stated would accompany a discharge which moved Fox. Fox knew that Piercey was in a position to carry out his threats. The court need only look at plaintiff's Exhibit "B" to see how the publicity threat was to be accomplished.

Plaintiff complains in his brief about the failure of the Commission to find that Chief Piercey made a particular statement which is alleged produced the fear which motivated the action of Fox. The law does not require other than a finding of the ultimate facts upon which the conclusions and decree are based. *Jonkele v. Texas Co.*, 88 U. 325, 54 P. (2d) 425.

The pleading of the Fire Department set up the resignation of Fox as a defense to his appeal. Fox answered that the resignation had been withdrawn before acted upon by the proper authority and that it was obtained by coercion and duress. The Commission found as facts that the withdrawal of the resignation was effected before acted upon by the City Commission and that the resignation was given involuntarily and obtained through the influence of fear, coercion and duress. Upon

these findings of fact the Commission ordered the reinstatement of Fox.

Defendants submit that there were findings made on all the material issues made by the pleadings and that those findings are supported by substantial evidence. As regards the time of the withdrawal of his resignation and its disposition by the plaintiff and the City Commission the facts are completely undisputed. The dispute is over whether or not the resignation was obtained by duress and coercion. On this dispute the defendant, Fox, testified clearly and definitely and his testimony, even if it were not substantiated and verified by the other testimony, would be substantial evidence from which the Commission could make the findings it made.

CONCLUSION

Defendants respectfully submit that the Civil Service Commission has the right and duty to hear appeals from removals based on resignations and that its actions in the present case were not arbitrary or capricious, but based on substantial evidence and the decision of the Commission, should be affirmed.

Respectfully submitted,

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